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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1627

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, GULF DEPARTMENT DISTRICT BOARD OF ADJUSTMENT OF BRAC, FULTON LODGE No. 2040, MESSRS. W. A. JOHNSON AND PAUL J. MASSON,

Petitioners,

—v.—

REA EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

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Preliminary Statement

The opinions of the Courts below are included in Petitioners' Appendix A; references to the decisions are cited with the suffix "a". Petitioners are referred to herein as "BRAC", and Respondent as "REA".

Statutory Provisions

The Courts below found it unnecessary to consider REA's contentions that the injunctive relief sought by BRAC was barred by Sections 7 and 8 of the Norris-LaGuardia Act (29 U.S.C. §§107-108). Section 8 provides (29 U.S.C. §108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Like Section 8 of the Norris-LaGuardia Act, the Railway Labor Act also contains an "every reasonable effort" requirement (45 U.S.C. §152 First).

Question Presented

In addition to the questions presented by BRAC the following question will be argued on behalf of REA if, contrary to the position taken in this brief, certiorari should be granted:

> "Whether a status quo order should be granted when the party requesting it (a) has failed to seek equitable relief first, instead of striking, (b) has failed either to seek arbitration or to honor its commitment to arbitrate the dispute, (c) has failed to invoke the statutory grievance procedure, and (d) would be

harmed less by the denial of such an order than the other party would be injured by its grant, as found by both courts below."

Statement of the Case

This case arose out of a strike situation. The strike took place *during the term* of a collective bargaining agreement.* REA, the carrier, sought and obtained a preliminary injunction, halting the strike. BRAC, the union, sought and obtained a status quo order to restrain operation of the 17 over-the-road truck runs which precipitated the strike. The status quo order was the subject of appeal; no appeal was taken from the preliminary injunction.

The District Court granted the status quo order in the belief that the dispute was "major", in the parlance which has developed under the Railway Labor Act, but stayed such order pending appeal upon finding that "the danger of irreparable injury to [REA] is greater than to [BRAC]" (33a). The Court of Appeals reversed the status quo order, concluding that the dispute was "minor", and directed the District Court to grant REA's motion to compel arbitration of the dispute (11a).

Pursuant to Section 3 of the Railway Labor Act (45 U.S.C. §153) the parties have established a Special Board

* The relevant portion of the duration clause provides "No proposals for changes in rates of pay, hours of service or working conditions will be initiated by either party during the period of this Agreement, except that notices may be served on or after April 1, 1971, provided such notices do not contemplate effective dates earlier than July 1, 1971." (R. 323.) The dispute arose more than six months before July 1, 1971. As BRAC's petition points out, "the matter was the subject of substantial correspondence and several meetings between representatives of BRAC and REA" between November 18, 1970, and the date of the strike, April 19, 1971 (Pet. 8).

of Adjustment by agreement. The agreement states that the Adjustment Board "shall have jurisdiction of, and shall hear and decide, claims and grievances (including discipline cases) arising out of the interpretation or application of agreements governing rates of pay, rules, or working conditions between the parties signatory hereto and which are submitted to the Board" (R. 310, Exh. C).

The agreement also acknowledges

> "... the right of management to determine methods of operations and the utilization of the working forces...";

and

> "... the right of the parties to be free from all work stoppages, slowdowns, lockouts or other interruptions of work during the term of this Agreement" (R. 310, Exh. C).

Omitted from BRAC's statement of facts but significant to REA's view of the case are the facts involving REA's repeated efforts to secure, and BRAC's to avoid, arbitration. On February 10, 1971, REA initiated arbitration under Section 7 of the Railway Labor Act, in accordance with the following contractual provision (2a-3a):

> "In the event of failure to make an agreement concerning the operation of a new run within forty-five (45) days after notice is given to the General Chairman or General Chairmen representing the employees to be affected, *the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended.* The issues submitted for such determination

shall not include any question as to the right of the Company to establish the run but shall be confined to the manner of implementing the run." (Emphasis added.)

For the purpose of complying with the above clause, REA named its arbitrator, and requested that BRAC do the same (R. 341). On March 5, after BRAC's representative cancelled a meeting previously scheduled to discuss the subject, REA sent another letter pointing out the need for BRAC to name an arbitrator (R. 343). To date, BRAC still has not done so.

On April 30, 1971, REA made a separate submission of the dispute to the Special Board of Adjustment established pursuant to Section 3 of the Act (R. 20, Pl. Exh. 36), the other alternative specified under the arbitration clause quoted above. This submission was made after it had become apparent that the parties were in disagreement about whether truck runs involved in the dispute were "new".

BRAC's statement of facts misleadingly suggests that its Section 6 notice was the product of this dispute (Pet. p. 8). Instead, the notice was a general reopener of the contract between REA and BRAC, proposing many changes in virtually every part of the contract (R. 505, Def. Exh. 26). As the District Court found, the dispute about the truck runs arose in the "fall of 1970" (23a); BRAC's Section 6 notice was not served until April 1, 1971, and could not have affected rights under the duration clause of the collective bargaining agreement prior to July 1, 1971.*

* The duration clause is quoted *supra* at p. 4.

The Section 6 notice was served months after the dispute arose, and could not have become effective until substantially after the strike—in fact, the notice itself specified July 1, 1971 as the effective date (R. 308a).

Totally lacking is any record support for the statements in the petition that REA refused to negotiate (Pet. pp. 8, 9, 19). REA attempted to negotiate as well as arbitrate its differences with BRAC. BRAC refused, preferring instead to take advantage of REA's financial weakness by conducting a strike. The District Court specifically found that there had been "protracted negotiations" (23a). Further, before entering its order the District Court directed the parties to make additional efforts to seek a negotiated settlement (R. 464):

> "During the ten-day period immediately following Tuesday, April 27 (beginning Wednesday, April 28), the parties shall meet and shall negotiate in an effort to resolve their differences, including assignment of drivers, rates of pay and working conditions respecting the other 15 runs.
>
> Should these successive negotiations be successful, it should bring this controversy to an end. Should these successive negotiations not be successful, the Court will promptly proceed to a determination as to the nature of the disputes involved (whether major or minor) and direct such further proceedings under the Railway Labor Act as may be appropriate in the light of such decision."

BRAC's petition contends that the decision of the Court of Appeals is based on findings which it "gratuitously" made with respect to Rule 12 of the collective bar-

gaining agreement (Petition 11, 21). By a sinuous, garbled factual statement, which certainly does not comport with the requirements of Rule 23(4),* Petitioners suggest that the Court of Appeals was not fully informed about Rule 12, making its decision "without a shred of evidence before it on that issue" (Petition 21-22). The fact is that, following oral argument, the Court requested supplemental briefs dealing in detail with the position of the parties as to the applicability of Rule 12. A true copy of the Court's request is annexed hereto as Appendix A. REA's supplemental brief was twenty pages long (not including lengthy appendices), and BRAC's was fourteen pages. Thus it cannot be seriously contended that the Court of Appeals was not fully briefed on the subject.

ARGUMENT

I.

Certiorari should not be granted to review a hypothetical case.

BRAC's petition is devoted to an argument based upon the assumption that the collective bargaining agreement and the rights of the parties thereunder are only tangentially if at all involved in this litigation. However, BRAC's representative admitted that the dispute at heart

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* Rule 23(4) states that:

"The failure of a petitioner to present with *accuracy*, brevity, *and clearness* whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." (Emphasis added.)

See *Furness, Withy & Company, Limited* v. *Yang-Tsze Insurance Ass'n Limited, et al.*, 242 U.S. 430 at 434 (1917).

was a contractual one in his first letter on the subject. The letter of the International Vice President, Mr. Devlin, dated February 23, 1971, written in response to REA's plan for the new runs, states:

> "Your proposals *are in violation of the Agreement.* I do not intend to document each and every violation in this letter because *the respective General Chairmen will file appropriate claims if this is necessary,* however, I should like to call to your attention a few facts that I hope will preclude the necessity of filing such claims." (R. 495, Exh. 18; emphasis added.)*

Later, of course, the BRAC served a Section 6 notice and attempted to frame the dispute in statutory terms. But the post hoc ergo propter hoc rationalizations of BRAC's lawyers can not convert the essence of the dispute into something which it is not.

> "In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the maneuvers of the parties . . . Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute . . . Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in

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* The "claims" referred to would be BRAC's way of initiating the grievance procedure and bringing the matter ultimately before the Adjustment Board in accordance with the requirements of Section 3 of the Railway Labor Act (45 U.S.C. §153). The union's subsequent failure to file such claims is an indication of BRAC's evident lack of confidence in their merits in the light of prior Adjustment Board rulings.

reality does not relate to that dispute." *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 at 33 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963).

To paraphrase a recent comment by this Court,

> "The difficulty with [BRAC's] position is that we must look to its [original statement], not to the arguments of its counsel, for the underpinnings of its [position]." *Federal Trade Commission* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972).

When one looks at BRAC's own initial view of the dispute, it is seen as purely a contractual matter which falls clearly within the ambit of the prior decisions of this Court concerning what constitutes a "minor" dispute. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 723-725 (1945), ("minor" disputes seek "to enforce contractual rights" (325 U.S. at 724)); *Union Pacific Co.* v. *Price,* 360 U.S. 601 at 609 (1959), ("minor" disputes arise "from the application of collective bargaining agreements to particular situations"); *Pennsylvania R. Co.* v. *Day,* 360 U.S. 548 at 550 (1959).

II.

The decision below raises no significant issues for review.

The decision below involves an issue that has been raised (and decided) many times before: was a "major" dispute or a "minor" dispute involved? There is no reason for the Supreme Court to decide the issue yet again.

Even if the meaning of the contract were "plain", in the eyes of the District Court, the Adjustment Board is not thereby deprived of jurisdiction. The Adjustment Board has exclusive jurisdiction over the *application,* as well as *interpretation* of collective bargaining agreements. Thus, it alone can provide the remedy for violation of the labor agreement. In *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960), the Supreme Court rejected the so-called "Cutler-Hammer" doctrine which had held there was nothing to arbitrate if the contract's meaning was plain, in favor of the "therapeutic values" of labor arbitration and the "common law of the shop" (363 U.S. 564 at 567-8). Similar rulings in favor of the values of arbitration were upheld in the other cases of the *Steelworkers* "Trilogy": *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960). If there were no dispute over the meaning of the terms of the agreement, the Adjustment Board nonetheless must provide the remedy for its violation. See *United Steelworkers* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).

The obligatory nature of the statutory grievance/arbitration procedure in Railway Labor Act cases was recently

underscored by this Court in *Andrews* v. *Louisville & Nashville Railroad,* 40 U.S.L.W. 4511 (May 15, 1972).

A decision by the Adjustment Board is of particular importance in this case. What BRAC has asserted, in essence, is that REA acted in violation of seniority rights. Seniority rights in particular are the product of the collective bargaining agreement and lie within the province of the Adjustment Board. Seniority districts fall under the jurisdiction of different union officials (General Chairmen). Typically one General Chairman does not want to lose work from one of his seniority districts to another General Chairman's seniority district. Thus, the matter becomes a jurisdictional dispute involving intra-union rivalry. The legislative history of and decisions under the Railway Labor Act make it clear that jurisdictional disputes were one of the chief reasons for the establishment of the Adjustment Boards. Under *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.,* 385 U.S. 157 (1966), there can be no question that this is a "minor" dispute requiring an Adjustment Board decision.

Moreover, this Court has held that any question as to whether a dispute is major or minor is within the primary jurisdiction of the Adjustment Board. "The court should exercise [its] equitable discretion to give that agency [the Adjustment Board] the first opportunity to pass on the issue." *Order of Railway Conductors et al.* v. *Pitney et al.,* 326 U.S. 561 at 567 (1946).

The various Courts of Appeals decisions are consistent, not conflicting, with the decision below. *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (1962), *cert. denied,* 372 U.S. 954 (1963), held that the

scheduling of new runs, such as is involved in the instant case, involved a minor dispute because (307 F.2d at 36):

> "... the existing agreements involved here, reasonably interpreted, may recognize implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960 .... Whether the railroad does in fact have the rights it claims, or whether on further analysis it does not is for the Board to determine; on the *ultimate* resolution of this issue we express no opinion."

Detroit & Toledo Shore Line R. Co. v. *United Transportation Union,* 396 U.S. 142 (1969) does not render this principle any less clear. In *Shore Line,* the interpretation of specific provisions of a written document or the application of an arbitration clause was not in issue; the rights the railroad relied on were not "expressed in an agreement" (396 U.S. at 148).

III.

The Court of Appeals' rejection of the District Court's interpretation of the contract does not warrant review.

It is clear that a Court of Appeals may reverse a District Court's unwarranted interpretation of a contract. The action by the Court of Appeals in doing so is not circumscribed by the "clearly erroneous" standard set forth in Rule 52 of the Federal Rules of Civil Procedure. As Judge Learned Hand stated in *Eddy* v. *Prudence Bonds Corp.,* 165 F.2d 157 (2d Cir. 1947), *cert. denied,* 333 U.S. 845 (1948):

> "It is not necessary to analyze the mental process by which a court imposes legal consequences upon verbal utterances; possibly, it is proper to call the result a

> 'finding of fact.' It is enough here, that, whatever the right description, such a finding is assailable as an ordinary finding of fact is not; for appellate courts have untrammelled power to interpret written documents." (165 F.2d at 163)

See also *Republic Pictures Corp. et al.* v. *Rogers,* 213 F.2d 662 (9th Cir. 1954); *United States* v. *John McShain, Inc.,* 258 F.2d 422 (D.C. Cir. 1958), *cert. denied,* 358 U.S. 832; *Cordovan Associates, Inc.* v. *Dayton Rubber Co.,* 290 F.2d 858 (6th Cir. 1961); *University Hills, Inc.* v. *Patton,* 427 F.2d 1094 (6th Cir. 1970).

IV.

Certiorari would serve no useful purpose because there are independent grounds for sustaining the decision below.

An order requiring restoration of the status quo rests on equitable considerations, including clean hands. BRAC's continuous delay in arbitrating the dispute, together with its use of the "ultimate weapon" of a strike—a strike which was illegal on any theory of the case—instead of seeking equitable relief if it felt itself wronged—shows that it is without clean hands. In a similar case, a railroad was denied an anti-strike injunction because it had rejected an offer of voluntary arbitration and thus had lost "the right to have the aid of equity in a federal court." *Brotherhood of Railroad Trainmen et al.* v. *Toledo, Peoria and Western Railroad,* 321 U.S. 50 (1944). This decision was based on the "every reasonable effort" requirement of Section 8 of the Norris-LaGuardia Act, which is applicable to employers and unions alike. BRAC has shown by its behavior that it has not exerted "every reasonable effort"

to settle this dispute. It therefore has no right to a status quo injunction.

The "every reasonable effort" requirement also is contained in Section 2 First (45 U.S.C. §152), which this Court recently held to be " . . . central to the effective working of the Railway Labor Act." *Chicago and North Western Railway Company* v. *United Transportation Union,* 402 U.S. 570 (1971).

Even though BRAC *argues* that REA's action was illegal, BRAC's strike *unquestionably* was illegal. The law seldom excuses a resort to a clearly illegal act by one on the basis of the commission of an allegedly but not clearly illegal act of another, especially when, as found below, the injury from the latter is not irreparable. No civilized legal system could long endure the philosophy that two wrongs make a right, and claims of illegality about action taken under a collective bargaining agreement are to be tested in ways other than on the economic battlefield. This is particularly true of a case in which the strike not only injures the opposing party but also, because of the essential nature of the services it performs, affects society generally. The fact that the problem of strikes relating to essential services, including transportation strikes, has been deemed so serious as to warrant national attention in at least three State of the Union messages, from Presidents of both parties, is not without significance in connection with this Court's consideration of a petition of a union which decided to flex its muscles instead of seek the attention of the courts at the outset of the dispute.

Even if the dispute indeed were "major", the strike would have been illegal because the statutory procedures had not been completed. *Detroit & Toledo Shore Line Railroad*

Co. v. *United Transportation Union,* 396 U.S. 142 (1969). Cf. *Brotherhood of Locomotive Engineers et al.* v. *Baltimore & Ohio Railroad Co. et al.,* 372 U.S. 284 (1963).

Further, the parties had agreed to arbitrate major as well as minor disputes, as shown in the language quoted *supra* on p. 4. ("... the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended.") Sections 3 and 7 of the Railway Labor Act both deal with arbitration (45 U.S.C. §§153, 157). Section 3 establishes a system of compulsory arbitration for "minor" disputes or, in the language of the statute, those disputes involving "grievances or ... interpretation or application" of the present collective bargaining agreement. *Brotherhood* v. *Chicago River & I.R. Co.,* 353 U.S. 30 (1957). Section 7 establishes a system of voluntary arbitration for "major" disputes, or those involving the formation of a new collective bargaining agreement.

In their arbitration clause, REA and BRAC agreed to arbitrate *all* disputes involving "new runs". The use of the disjunctive "Sections 3 and/or 7 of the Railway Labor Act" indicates the parties had agreed to arbitrate whether the dispute be regarded as "major" or "minor".*

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* While this provision relates only to "new" runs, disputes involving existing or "old" runs clearly would fall under the normal "minor" dispute grievance arbitration provisions. See *Rutland Ry. supra.* This is the paradox embodied in the decision of the District Court. Central to its reasoning was the belief that at least part of the runs were not "new"; yet, if the runs were not "new" they had to be *old,* making the dispute *a fortiorari* "minor" (i.e., arbitrable) in nature. It is inconceivable that the parties to a collective bargaining contract would have agreed to arbitrate the greater but not the lesser departure from past practice, yet this logical fallacy underlies the District Court's decision.

V.

Certiorari should not be granted in an equity action where both courts below found the balance of injury favors the result reached.

The Court of Appeals stated (11a):

> "The District Court was careful to point out that a status quo order rescinding REA's unilateral implementation of the 17 proposed runs might cause far greater irreparable harm to REA than to BRAC. We agree." *

Under the "two court" rule, such findings are conclusive. *Graver Tank and Mfg. Co., Inc. et al.* v. *Linde Air Products*

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* The District Court's finding on the subject is as follows (32a-33a):

> "Though not called upon to do so, the court, after hearing the evidence in this case, expresses the opinion: (1) that, in the long run, the making of the changes proposed by the plaintiff here (as distinguished from the manner in which they were proposed and made) is probably in the best interest of both parties; and (2) that the defendant union probably has no serious objection to them per se, provided only that the manner of their implementation can be agreed upon. In view of these opinions the court has ordered restoration of the status quo most reluctantly and only because it felt compelled to do so. The court therefore recommends to the parties that, if they agree with these conclusions, they proceed with all haste to attempt to reach an agreement. It has also occurred to the court that the conclusions reached in this order may be found to be wrong. If so, much damage may have accrued and many backward steps may have been taken. The court also believes that, pending an appeal, if any, the danger of irreparable injury to plaintiff is greater than to defendant. If the position of defendant is affirmed it can always exact restitution in the end. In view of these considerations, and in order to give the parties time to consider the suggestions made by the court, it is therefore ORDERED that execution of this order be stayed for a period of ten days or until a ruling on any appeal herein, should one be filed."

Co., 336 U.S. 271 at 275 (1949), and cases cited therein; *Virginia Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 at 542 (1937); *Texas, New Orleans R. Co. et al.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548 at 558 (1930).

In such circumstances, with the balance of injury favoring the result already reached, it seems highly questionable, to say the least, whether this case is of the importance which warrants consideration by the Supreme Court.

CONCLUSION

Certiorari should be denied and the petition dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify the foregoing Brief in Opposition to Certiorari was served by causing two true copies thereof to be airmailed, postage prepaid, to each counsel of record at his post office address this 28th day of July, 1972: Highsaw & Mahoney, Suite 506, 1015 Eighteenth Street, N.W., Washington, D.C. 20036 and William J. Donlon, General Counsel, Brotherhood of Railway and Airline Clerks, 6300 River Road, Rosemont, Illinois.

Arthur M. Wisehart

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

January 14, 1972

To ALL COUNSEL OF RECORD

Re: No. 71-2212—REA Express, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks, etc., et al.

Dear Sirs:

The Court requests that each party furnish a supplemental brief responding to the following inquiries:

1. Appellee has argued that even assuming all 17 of the over-the-road runs here at issue are "new runs" within the meaning of Rule 8 and its accompanying Memorandum of Understanding, changes in seniority rights are not within the scope of that rule and that, therefore, such changes in seniority rights must be considered as major disputes. Are the changes in seniority rights which have resulted from REA's unilateral implementation of the 17 over-the-road runs governed by Rule 12(b) through (e)? Additionally, are these changes the result of transfers of positions of work from one seniority district to another such that the procedures outlined in Rule 12(a) are applicable?

2. Assuming that the controversy over implementation of the 17 over-the-road runs substantially involves minor disputes which are properly the subject of arbitration

under RLA § 3 and/or § 7 and at the same time involves major disputes which are properly the subject of mediation under RLA § 6, should this Court denominate the entire controversy as "minor" or should it characterize the entire controversy as "major"?

Each party must file four (4) legible copies of the requested supplemental brief, either typewritten or printed, by January 28, 1972.

Yours very truly,

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk

cc: Honorable Griffin B. Bell
Honorable Robert A. Ainsworth, Jr.
Honorable John C. Godbold